Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
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(6) (3) (4)

Nos. 88-309, 88-492 and 88-553

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, CROSS-PETITIONERS

v.

STATE OF WYOMING, ET AL.

CITY OF RIVERTON, WYOMING, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the "water proviso" of the Act of March 3, 1905 (33 Stat. 1020)—which provides that the remaining balance of an $85,000 sum to be obtained from the sale of certain lands of the Wind River Indian Reservation shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, * * * "—demonstrates that no federal reserved water rights were created when that Reservation was set aside in 1868 by the Second Treaty of Fort Bridger, or, alternatively, whether that water proviso terminated all reserved water rights created by the 1868 Treaty.

2. Whether the Act of March 3, 1905, which provided for the sale of certain reservation lands of the Wind River Indian Reservation and further provided that the Indians were to be compensated out of the sales proceeds as the lands were sold, terminated the federal reserved water rights attaching to lands that were never sold.

3. Whether this Court should reconsider its holding in *Arizona* v. *California,* 373 U.S. 546 (1963), that the amount of water reserved for agricultural purposes when an Indian reservation is established is that quantity of water that is required to irrigate the practicably irrigable acreage within the reservation.

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[1] This summation of the questions presented encompasses only those questions raised in the petition filed by the State of Wyoming in No. 88-309 and the cross-petition filed by the City of Riverton, Wyoming, et al., in No. 88-553. As discussed in the text below, the United States suggests that the Court grant review of the additional questions presented in the conditional cross-petition filed by the Shoshone and Northern Arapaho Tribes in No. 88-492, in the event that the Court grants the State's petition.

4. Whether the Wyoming Supreme Court erred by failing to use the discount rate formula established pursuant to Section 80(a) of the Water Resources Development Act of 1974, 88 Stat. 34, 42 U.S.C. 1962d-17(a), to determine whether certain reservation lands that have never been irrigated are practicably irrigable.

5. Whether the Wyoming Supreme Court correctly resolved issues concerning the status of water rights for lands that had at some previous time been conveyed to non-Indians.

6. Whether the United States may be estopped in this case from asserting reserved water rights on behalf of the Indian Tribes pursuant to a federal treaty.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. 1a-119a) is reported at 753 P.2d 76. The district court's amended judgment and decree (Pet. App. 168a-184a), order ruling on motions to alter or amend the decision

(Pet. App. 185a-210a), and decision (Pet. App. 202a-279a) are not yet reported. The report and decree of the special master (Pet. App. 367a-708a) are also unreported.

JURISDICTION

The decision of the Wyoming Supreme Court (Pet. App. 1a) was entered on February 24, 1988. Timely petitions for rehearing were denied on April 22, 1988 (Pet. App. 120a). On July 7, 1988, Justice White extended the time for filing a petition for a writ of certiorari to August 20, 1988. The petition for a writ of certiorari was filed on August 18, 1988. The cross-petitions in Nos. 88-492 and 88-553 were filed on September 21, 1988, and are timely under Rule 19.5 of the rules of this Court. The jurisdiction of this Court over the petition and cross-petitions is invoked under 28 U.S.C. 1257(3).

STATEMENT

The State of Wyoming petitions for a writ of certiorari to review the Wyoming Supreme Court's decision, in the first phase of a general stream adjudication, recognizing the reserved water rights of the Shoshone and Northern Arapaho Indian Tribes. The Indian Tribes and certain non-Indian respondents have filed cross-petitions for a writ of certiorari.

1. In 1977, Wyoming enacted legislation authorizing its Attorney General to "institute an action to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system and all other sources * * * " (Wyo. Stat. § 1-37-106 (1977) (Pet. App. 726a-728a)). The State then promptly commenced this action in the Wyoming District Court for the Fifth Judicial District. The complaint sought a general adjudication of the rights to use water in Water

Division No. 3, which consists primarily of that portion of the Big Horn River drainage system located within Wyoming, including the Wind River Indian Reservation.[2] The complaint requested, in essence, a determination of all water rights within Water Division No. 3. The United States was joined under the McCarran Amendment, 43 U.S.C. 666.

The state district court, after granting intervention for the Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Reservation, referred the case to a special master.[3] The special master divided the case into three phases. Phase I—the phase at issue here—encompasses water rights reserved by federal law and held by the Shoshone and Northern Arapaho Tribes or by the United States on their behalf, and Indian reserved rights claimed by non-Indian successors to Indian allottees.[4]

a. The Wind River Indian Reservation was established on July 3, 1868, by the Second Treaty of Fort Bridger, 15 Stat. 673 (Pet. App. 793a-803a), which was entered into by the United States and the Shoshone and Bannock Tribes.[5]

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[2] Water Division No. 3 also included the Clark's Fork of the Yellowstone River (Pet. App. 9a).

[3] The United States had initially removed the action to the United States District Court for the District of Wyoming, but that court remanded the suit back to state court (Pet. App. 718a-724a).

[4] Phase II covers all non-Indian reserved water rights claimed by the United States in Water Division No. 3, while Phase III involves all water rights in that division not covered by Phases I and II. Phase III includes rights evidenced by state permits or certificates held by the United States, its agencies, and the Shoshone and Arapaho Tribes. Phase II was resolved by a stipulation and judgment, while Phase III is still pending (Pet. App. 13a-15a).

[5] The Bannock Tribe, as provided in Article II of the 1868 Treaty (15 Stat. 674), subsequently chose for itself the Fort Hall Reservation in what is now the State of Idaho. There is also a band of Shoshone Indians on the Fort Hall Reservation.

Under the 1868 Treaty, the Shoshone Tribe relinquished to the United States all claims to more than 44 million acres in what are now the States of Colorado, Utah, Idaho, and Wyoming.[6] In return, the Shoshone Tribe accepted the Wind River Reservation in what is now Wyoming. The Reservation consisted of approximately 3 million acres "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * * and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" (art. II, 15 Stat. 674). The Indians agreed to make the Reservation their permanent home (art. IV, 15 Stat. 674-675). The Treaty provided for the allotment of reservation lands to individual Indians who "shall desire to commence farming" (art. VI, 15 Stat. 675) and further provided for seeds, implements, and agricultural instruction for Indians who commenced cultivation (art. VIII, 15 Stat. 675-676). In 1878, the Northern Arapaho Tribe was settled on the Wind River Reservation without the consent of the Shoshone Tribe. See *United States* v. *Shoshone Tribe,* 304 U.S. 111, 114 (1938).

By an agreement signed in 1904 and approved with modification by the Act of March 3, 1905, ch. 1452, 33 Stat. 1016 (Pet. App. 769a-781a), the Shoshone and Northern Arapaho Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest * * * " in the portion of the Reservation located north of the Wind River, as well as the portion located east of the

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[6] The boundaries of the "Shoshone country" were described in Article IV of the First Treaty of Fort Bridger, concluded on July 2, 1863, 18 Stat. 685, 686. The First Treaty of Fort Bridger was one of several treaties concluded in 1863 between the United States and the various bands of Shoshone Indians. See *Northwestern Band of Shoshone Indians* v. *United States,* 324 U.S. 335 (1945).

Popo Agie River (art. I, 33 Stat. 1016).[7] The ceded lands, which amounted to approximately 1,480,000 acres (Pet. App. 10a), were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). The United States, however, did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (art. IX, 33 Stat. 1018).

Article III of the 1904 Agreement provided that $85,000 of the sum derived from the sale of the subject lands would be devoted to making a per capita cash payment of $50 dollars to each Indian (33 Stat. 1017). Following this per capita payment, the remaining balance of the $85,000 sum "shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve" (33 Stat. 1017).

By 1914, approximately 129,000 acres of the 1,480,000 acres covered by the 1904 Agreement (and 1905 Act) had been sold. See Pet. App. 412a. In 1915, however, the Sec-

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[7] The Indians had made two earlier cessions of lands included within the Wind River Indian Reservation as established by the 1868 Treaty. These were the "Lander Purchase" or "Brunot Agreement" executed on September 26, 1872, and ratified on December 15, 1874, 18 Stat. 291 (Pet. App. 409a), and the "Thermopolis Purchase" or "First McLaughlin Agreement" executed on April 21, 1896, and ratified on June 7, 1897 (30 Stat. 93 (Pet. App. 410a)).

retary of the Interior temporarily postponed further sale of the ceded lands, and from 1915 through 1934 only a few acres were sold. See *id.* at 412a-413a. In 1934, Congress enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984, which, among other things, authorized the Secretary of the Interior to restore fully to permanent tribal ownership the remaining surplus lands of any Indian reservation previously opened to sale or other forms of disposal. See 25 U.S.C. 463(a). Later that same year, the Secretary temporarily withdrew from further disposition the remaining land ceded under the 1904 Agreement (Pet. App. 413a). Subsequently, under a series of restoration orders approved by Congress (*id.* at 731a-752a), all of the remaining undisposed lands ceded by the 1904 Agreement were fully restored to permanent tribal ownership. See *id.* at 413a. In addition, numerous parcels of land on the Reservation that had once passed into non-Indian ownership, either by sale under the 1905 Act or by purchase from Indian allottees, have been reacquired on behalf of the Tribes. See *id.* at 11a.

b. The special master issued his report and recommended final decree on December 15, 1982 (Pet. App. 367a-708a).[8] The special master found that the purpose of the 1868 Treaty was to establish a permanent homeland for the Indians and that this purpose included, but was not limited to, agricultural development of the reservation lands suitable for that purpose (Pet. App. 442a-443a, 643a). Applying the doctrine announced by this Court in *Winters* v. *United States,* 207 U.S. 564 (1908), the special

[8] We describe here only those rulings of the special master, the district court, and the state supreme court that are the most pertinent to the issues raised in the petition. The special master and state courts also entered various other rulings that are discussed in the cross-petition filed by the Tribes.

master found that "Congress, by ratification of the Treaty of 1868, impliedly created a reserved right for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty" (Pet. App. 641a). The special master then determined that the reserved water rights created by the 1868 Treaty had not been terminated by the 1904 Agreement and that the Tribes continue to hold reserved water rights with an 1868 priority date for lands that were never sold pursuant to the 1904 Agreement (*id.* at 411a-420a, 638a-639a). He further ruled that the United States was not estopped from asserting federal reserved water rights on behalf of the Indians (*id.* at 623a-627a, 687a-688a).

The special master recommended the award of an 1868 priority date with regard to all tribal, allotted, or Indian fee land within the reservation that has never left Indian ownership or that had left Indian ownership but had been reacquired by the Tribes prior to the date of his report, provided that the lands were shown to be practicably irrigable (Pet. App. 424a-425a, 639a, 641a-642a). The special master also ruled that non-Indians who purchased land from Indian allottees did not acquire a share of the Indians' reserved water rights (*id.* at 425a-431a, 640a).

Turning to the task of quantifying the agricultural reserved water right, the special master ruled that the amount of water reserved for such purposes was that quantity required to irrigate those lands shown to be "practicably irrigable acres" (Pet. App. 534a). He defined "practicably irrigable acres" (in accordance with the use "agreed upon [in this case] by counsel for the State, the United States and the Tribes") as defined to mean "those acres susceptible to sustained irrigation at reasonable costs" (*ibid.*). Applying this standard, the special master first addressed and resolved issues regarding the Reservation's "historic acres"—lands that are now irrigated or that have been irrigated in the past (*id.* at 463a-531a, 643a-

672a). He then addressed and resolved matters concerning the Reservation's "future lands"—lands that have not been irrigated to date but that are claimed to be practicably irrigable (*id.* at 532a-591a, 672a-682a). In resolving the future lands issue, the special master accepted the testimony of the United States' witnesses that a "real" discount rate of four percent—which excludes the effects of present or expected inflation—should be used in determining whether the future lands can be feasibly irrigated (*id.* at 574a-580a, 680a). The special master ultimately recommended an award of 477,300 acre-feet per year for irrigation purposes.[9] The special master also recommended an award of additional reserved waters based on non-agricultural purposes (*id.* at 696a-702a).[10]

c. The district court accepted most of the recommendations of the special master (Pet. App. 121a-131a, 168a-279a). The district court concluded, however, that the primary purpose of the 1868 Treaty was to create an agricultural reservation, and it therefore rejected the special master's recommendations to confirm reserved

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[9] This figure was based on a recommended award of 288,355 acre-feet needed to irrigate 54,389 acres of Indian lands, including Indian-owned fee lands, that have historically been irrigated, plus an additional 188,937 acre-feet needed to irrigate 48,520 acres in "future projects" (Pet. App. 695a). The special master also recommended that the decree limit construction of any irrigation projects for the future lands to no more than ten percent of total awarded acreage for future projects in any given decade following 1982, unless sufficient replacement waters are made available through upstream storage facilities so as to allow non-Indian water users to continue to use the same amounts as they are presently using (*id.* at 580a-584a).

[10] The special master subsequently issued a Supplemental and Final Report (Pet. App. 280a-366a) addressing primarily the claims of non-Indians holding former allotted lands. The special master ruled that "non-Indians who purchase from Indians do not receive superior rights stemming from the treaty" (*id.* at 286a).

water rights for non-agricultural purposes (*id.* at 182a, 216a-222a, 262a-263a). The district court also rejected the special master's recommendation of an 1868 priority date for lands that had passed into non-Indian ownership and had since been reacquired. The court ruled that the priority date for such lands was to be the earliest of: 1) the date upon which the land left Indian ownership and was purchased by a non-Indian; 2) the date of the applicable state water permit; or 3) the date of first application of water to beneficial use (*id.* at 173a). The district court awarded a reserved right of 394,631 acre-feet annually with an 1868 priority date (*id.* at 169a-172a) and a reserved right totalling 84,800 acre-feet with varying priority dates (*id.* at 172a-182a). In addition, the district court initially adopted that part of the special master's recommendation that would condition the use of the portion of the 1868 reserved water right awarded with respect to the future lands upon the provision of storage facilities sufficient to provide replacement water to junior non-Indian water users (*id.* at 234a-237a, 267a). Upon reconsideration, however, the court held that the water right could be exercised in the absence of any storage facilities to provide replacement water (*id.* at 194a-198a, 200a-201a).

2. The Wyoming Supreme Court affirmed most of the rulings of the district court (Pet. App. 1a-119a). It found, however, that the district court had erred in adopting the special master's recommendation of a ten percent reduction in the Indians' "future projects" land base to provide a margin of error (*id.* at 56a-58a). The court also ruled that the non-Indian appellants who acquired lands from Indian allottees must be awarded a reserved water right having an 1868 priority date for any of those lands that they can show are practically irrigable and either were irrigated by their Indian predecessors or were put under irrigation within a reasonable time after the date upon which they passed from Indian ownership (*id.* at 75a). Finally, the

court agreed with the special master's finding of an 1868 priority date for the reserved water rights claimed for allotted lands that had passed into non-Indian ownership and that had subsequently been reacquired by the Tribes. Accordingly, the Wyoming Supreme Court reversed the district court's holding of a later priority date for such lands (*ibid.*).

ARGUMENT

The State of Wyoming initiated this action to obtain a quantification of the Indian Tribes' water rights in the Big Horn Basin. Now, after a decade of litigation, including review by that State's highest Court, Wyoming has obtained what it sought—a definitive resolution of the Tribes' entitlement. Here, as is usually the case in complex general stream adjudications, none of the parties has obtained everything that it sought. But the Wyoming Supreme Court's decision is fundamentally fair, and the particular portions of the opinion below that petitioner and the non-Indian cross-petitioners now challenge are correct and do not conflict with any decision of this Court. To the contrary, they are consistent with this Court's decisions concerning water rights claimed on behalf of Indian reservations. Nor has the Wyoming Supreme Court articulated legal principles in this case that conflict with those followed by other appellate courts in similar cases. Accordingly, the petition for a writ of certiorari—and a fortiori the Indian and non-Indian cross-petitions—should be denied.

1. This Court held in *Winters* v. *United States*, 207 U.S. 564 (1908), that when the United States reserves lands on behalf of an Indian tribe, the United States at the same time also impliedly reserves for the use of the Indians such previously unappropriated waters as are needed to fulfill the purposes of the reservation. As the Court has since explained: "*Winters* concluded that the Government, when it

created [the] Indian reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona* v. *California,* 373 U.S. 546, 600 (1963) (*Arizona I*). These *Winters* reserved water rights vested "as of the time the Indian Reservations were created." *Arizona I,* 373 U.S. at 600.

The language of the 1868 Treaty unambiguously indicates that one of the purposes of that treaty was to promote the establishment of agriculture on the Wind River Reservation. Furthermore, it is undisputed that the reserved lands require irrigation in order to produce crops (Pet. App. 26a). Thus, the special master, the district court, and the Wyoming Supreme Court all found, in accordance with the *Winters* doctrine, that the 1868 Treaty was intended to reserve water to carry out the agricultural purposes of the Reservation (*id.* at 26a-31a, 210a-222a, 431a-446a). Petitioner does not contend that the language of the Treaty itself or any documents or circumstances contemporaneous with its execution and ratification suggest a contrary result.[11] Rather, petitioner asserts (Pet. 12-18) that the "water proviso" to the 1905 Act somehow precludes the "judicial creation" of an implied reserved water right for the Reservation (Pet. 12), or, alternatively, that any reserved water rights created by the 1868 Treaty were subsequently extinguished by the water proviso to the 1905 Act.

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[11] Petitioner does suggest that the *Winters* doctrine has been undermined by *United States* v. *New Mexico,* 438 U.S. 696 (1978). Petitioner relies on a passage from that opinion that states (*id.* at 700):

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

Petitioner, taking the words "entirely defeated" out of their context, maintains (Pet. 15-16) that the agricultural purposes of the Wind

The Wyoming Supreme Court properly rejected these contentions (Pet. App. 28a-32a). The 1905 Act does not, of course, shed any direct light on the intent of the parties to the 1868 Treaty. And even if that legislation provided a basis for inferring the 1905 Congress's view of the 1868 Treaty, such inferences would carry limited weight. It is "well settled" that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Russello* v. *United States,* 464 U.S. 16, 26 (1983) (quoting *United States* v. *Price,* 361 U.S. 304, 313 (1960)).

The 1905 Act, in any event, provides no reasonable basis for inferring the 1905 Congress's views on whether the 1868 Treaty created a reserved water right. The water proviso, which appears in Article III of the 1905 Act (Pet. App. 778a-779a), merely states that the remaining balance of an $85,000 sum to be obtained from the sale of certain Indian lands shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights

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River Indian Reservation would not have been "entirely defeated" without a federal reserved water right because the Indians could have obtained water rights to a portion of their lands by securing the rights under state law. The possible availability of a state-law water right for some lands, however, is not an appropriate basis for rejecting a federal reserved right. Rather, as the extract from *New Mexico* quoted above clearly indicates, the appropriate test focuses upon whether water is needed in the physical sense to attain the purposes of the reservation. If so, then the courts will find an implied federal reserved water right effective as of the date the reservation was established. *Cappaert* v. *United States,* 426 U.S. 128, 138-139, 145 (1976). In this case, that date is 1868, long before Wyoming was admitted to the Union and therefore long before water rights could have been acquired pursuant to state law.

from said State for the irrigation of such lands as shall remain the property of said Indians * * * " (33 Stat. 1017). This proviso provides no concrete basis for inferring a congressional understanding that the 1868 Treaty—despite its explicit contemplation of agricultural development—failed to reserve the water necessary for that development. The proviso indicates, *at most,* some doubt whether—or to what extent—such reserved water rights existed. The 1905 Act, of course, predated this Court's 1908 *Winters* decision. Thus, the contours of the federal reserved rights doctrine, and the quantities of water that might be claimed under that doctrine, were then unresolved. Congress, responding to this uncertain state of the law, presumably elected to assist the Tribes in securing water rights in order to ensure that the Tribes would receive sufficient water for their land even if federal law did not already secure the necessary water rights. Petitioner's further inference that Congress's actions should be taken as an affirmative denial by Congress of the existence of a reserved water right is unwarranted.[12]

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[12] Petitioner is mistaken in suggesting (Pet. 12-13, 17) that Congress's rejection of proposals that would have expressly created a reserved right for the Wind River Reservation demonstrate that Congress wished to deny the Tribes such rights. The proposal to amend the 1905 Act to give the Indians a grace period in which to secure their own permits for allotments on the ceded portion of the Reservation (see H.R. Rep. 3700, 58th Cong., 3d Sess. 7-9 (1905)) does not indicate a congressional belief that there never was any prior intent to reserve water for the Indians. This proposal was rejected because it was feared that the statutory grace period would delay settlement of the opened area. See S. Rep. 4263, 58th Cong., 3d Sess. 2 (1905). As for the 1914 proposal, it was not enacted because it was introduced as an amendment to an appropriations bill and was ruled out of order. See Pet. App. 31a. In either instance, Congress's inaction is entitled to little weight in interpreting the 1868 Treaty. See, *e.g., Red Line Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 n.11 (1969).

A fortiori, the water proviso of the 1905 Act cannot reasonably be read as impliedly terminating the reserved water rights conferred by the 1868 Treaty.[13] This Court has required that "Congress's intention to abrogate Indian treaty rights be clear and plain." *United States* v. *Dion,* 476 U.S. 734, 738 (1986). See also, *e.g., Solem* v. *Bartlett,* 465 U.S. 463, 472 (1984). Petitioner falls far short of meeting that standard. The water proviso of the 1905 Act, which was essentially an appropriations measure concerning the disposition of a part of the funds to be generated by the land sales contemplated in the 1904 Agreement, does not expressly or impliedly surrender any water rights for the unsold lands that the Tribes held prior to the enactment of that statute. Nor has petitioner advanced any legislative history or surrounding circumstances showing a clear congressional intent to diminish existing treaty water rights for lands remaining in Indian ownership.[14] Indeed, Article X of the 1904 Agreement stated that nothing in that Agreement would deprive the Indians "of any benefits to which they are entitled under existing treaties or agree-

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[13] We address here petitioner's argument (Pet. 15-18) that the water proviso terminated all of the 1868 Treaty reserved water rights, without distinction as to the lands made subject to disposition under that Act and the lands of the "diminished" Reservation. We deal below with petitioner's separate argument (Pet. 26-28) concerning the lands that were made subject to sale under the 1905 Act but that never passed into non-Indian ownership and were later restored to the Indians.

[14] Petitioner incorrectly asserts (Pet. 17) that "the Wyoming Supreme Court failed even to address the fact that Congress carefully considered and refused to enact a limited reserved water right for the Wind River Indian Reservation * * *." The Wyoming Supreme Court considered (Pet. App. 29a-31a) these congressional inactions (see n.12, *supra*) and determined that they do not reflect any intent concerning any water rights that were created by the 1868 Treaty. Consequently, the court concluded, those inactions failed to demonstrate that the 1905 Act terminated the Tribes' treaty water rights (Pet. App. 31a).

ments, not inconsistent with the provisions of this agreement" (Pet. App. 774a). Petitioner would read the 1904 Agreement as effecting a termination of all of the Tribes' treaty water rights, including those for lands that were not subject to disposition under the Agreement and for which no compensation whatsoever was to be provided. This Court should decline petitioner's invitation to construe the water proviso as a "backhanded way of abrogating the [treaty] rights of these Indians." *Menominee Tribe* v. *United States,* 391 U.S. 404, 412 (1968).[15]

2. Petitioner alternatively maintains (Pet. 26-28) that the Wyoming Supreme Court erred by confirming an 1868 priority date for the reserved water rights respecting lands that, although made subject to disposition under the 1905 Act, were never sold and were later restored to the Indians. Petitioner asserts that the 1904 Agreement effected an immediate relinquishment of the Indians' reserved water rights for all of those lands. The Wyoming Supreme Court correctly rejected that contention.

Article I of the 1904 Agreement provided that the Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest" in the subject lands (33 Stat. 1016). The ceded lands were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States

[15] If the parties to the 1904 Agreement had intended to effect a termination of the Indians' water rights, they were well aware of how to draft a provision reflecting such intent. The negotiator on behalf of the United States was the same Agent James McLaughlin who had negotiated the earlier "Thermopolis Purchase," concluded in 1897, by which the Indians had ceded approximately 55,000 acres of the Wind River Reservation to the United States. Unlike the 1904 Agreement, however, the Thermopolis Purchase Agreement provided not only for a cession of the subject lands, but also for cession of "the water rights appertaining thereunto * * * " (Pet. App. 410a). Those water rights, of course, could only have been federal reserved water rights.

agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). Article IX provided, however, that the United States did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (33 Stat. 1018).

Statutes ratifying agreements with Indians are to be construed in favor of the Indians. *Antoine* v. *Washington,* 420 U.S. 194, 199 (1975). Notably, the 1904 Agreement did not state, as did various other turn-of-the-century surplus lands acts, that the subject lands were being "conveyed" to the United States. See *Solem* v. *Bartlett,* 465 U.S. at 469 n.10. Rather, the United States was to hold the lands in trust for the Indians for the purpose of future sale. The Indians were not to receive a fixed amount in return for the lands; instead, they were to be compensated as the lands were sold. Indeed, the 1904 Agreement expressly declined to guarantee that purchasers for all of the lands would ever be found. Under these circumstances, the unsold lands were not restored to the public domain but, instead, always retained their status as Indian lands. See *Ash Sheep Co.* v. *United States,* 252 U.S. 159, 164-166 (1920); *United States* v. *Brindle,* 110 U.S. 688, 693 (1884). See also *Solem* v. *Bartlett,* 465 U.S. at 473; *Ute Indian Tribe* v. *State of Utah,* 773 F.2d 1087, 1090 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Because the Indians would receive no compensation for any given parcel as long as that tract remained unsold, and because there was no assurance that the subject lands would ever be sold, the 1905 Act can be read in the manner petitioner suggests only by assuming an implied intent to effect an immediate, uncompensated termination of treaty water rights for lands that still retained their Indian status and

that might retain that status indefinitely. Such an assumption would be contrary to the rule disfavoring the construction of statutes ratifying agreements with the Indians to their prejudice. It would be illogical as well. The unsold lands themselves never lost their status as lands reserved for the benefit of the Indians, and, accordingly, they continued to have a federal reserved water right as an inherent attribute of that status.[16]

3. This Court held in *Arizona I* that when Congress establishes an Indian reservation, the measure of water reserved for agricultural purposes is the amount sufficient "to irrigate all the practicably irrigable acreage on the reservation[ ]" (373 U.S. at 600-601). The Wyoming Supreme Court expressly applied that standard to quantify the amount of water reserved for the Wind River Indian Reservation (Pet. App. 47a). Petitioner now requests (Pet. 18-26) this Court to reconsider the practicably irrigable acreage (PIA) standard. That request should be denied.

Petitioner, after a decade of litigation, asserts that the PIA standard should be abandoned and the quantification process should begin anew using some other standard that would be determined by reference to the Indians' reasonable needs. This Court, however, expressly rejected peti-

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[16] Petitioner relies (Pet. 28) on *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), which concerned the question whether a reservation had been disestablished for purposes of determining governmental jurisdiction over lands within the area in question. By contrast, the issue presented here is not whether the 1905 Act diminished the exterior boundaries of the Wind River Reservation for jurisdictional purposes, but rather a distinct question of property rights: whether that statute effected an immediate, implied termination of the Indians' reserved water rights for such lands. As the Indians' beneficial ownership of those lands continued up to the time of their sale, the Tribes' reserved water rights – which were one of the incidents of their beneficial ownership – likewise remained in effect pending disposition and continued uninterrupted for those lands that were never sold.

tioner's substitute methodology in *Arizona I*, stating (373 U.S. at 601):

> How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

That reasoning is equally compelling here.[17]

Petitioner asserts that the continuing validity of the PIA standard has been called into question by this Court's subsequent opinions in such cases as *United States* v. *New Mexico*, 438 U.S. 696 (1978), and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*). Similarly, the non-Indian cross-petitioners contend (88-553 Cross-Pet. 10-18) that the *New Mexico* decision created an "equitable device" (*id.* at 17), whereby a court must consider junior

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[17] Petitioner attempts to distinguish *Arizona I* on the ground (Pet. 19, 20, 23, n.25) that the reservations in question there had not been established for the use of any particular tribes specifically identified when those reservations were created. Nothing in this Court's *Arizona I* opinion, however, attributes any significance to that circumstance. The Court rejected a "future needs" standard in favor of the PIA standard because "[h]ow many Indians there will be and what their future needs will be can only be guessed" (373 U.S. at 601). The statement remains accurate even when only one Indian tribe is being considered. But even if petitioner's suggestion were meritorious as a matter of law, it would be unavailing here. Article II of the 1868 Treaty stated that the Wind River Indian Reservation was set aside for the use of the Shoshone and Bannock Tribes "and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them." 15 Stat. 674. Hence, the 1868 Treaty contemplated the possible settlement of additional, unspecified tribes on the Reservation. Subsequently, the Arapaho Tribe was settled upon the Wind River Indian Reservation without the consent of the Shoshone Tribe. See page 4, *supra*.

non-Indian uses of the common water supply and, depending upon the particular facts, limit the exercise of the Indians' senior water rights in order "to protect [junior] state water users *after* the facts and law have been correctly applied" (Pet. App. 17a (emphasis in original)).

This Court has previously declined to reconsider the PIA standard in light of *New Mexico* and *Fishing Vessel*. *Arizona* v. *California*, 460 U.S. 605, 625-626 (1983) (*Arizona II*). In any event, petitioner's and cross-petitioners' reliance upon *New Mexico* and *Fishing Vessel* is misplaced. The question considered by this Court in *New Mexico* concerned the purposes for which water is reserved when lands are set aside for a national forest, and *Fishing Vessel* involved the allocation of fisheries where the Indians hold a treaty right to fish "in common with all citizens of the Territory." 443 U.S. at 659. Neither case concerned Indian water rights or addressed the PIA standard.

Furthermore, *New Mexico* does not, as the non-Indian cross-petitioners contend, furnish an "equitable device" for limiting the exercise of a federal reserved right once it has been determined such a right exists. Rather, *New Mexico* concerned only the issue of what circumstances are sufficient to give rise to a federal reserved water right in the first place. This Court stated (438 U.S. at 702):

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would ac-

> quire water in the same manner as any other public or private appropriator.

The *New Mexico* decision does not announce any equitable limitations on the recognition of a federal reserved water right. The decision simply holds that *implication* of a federally reserved water right to fulfill a reservation's secondary purposes would be inconsistent with Congress's policy of deferring to state water law. Indeed, this Court has expressly declined to adopt an "equitable balancing" approach in cases involving federal reserved water rights. The State of Nevada contended in *Cappaert* v. *United States, supra,* that this Court's decisions involving federal reserved water rights established "an equitable doctrine calling for a balancing of competing interests" (426 U.S. at 138). This Court, however, rejected that contention, noting that "an examination of those cases shows they do not analyze the doctrine in terms of a balancing test" (*ibid.*).[18] Cross-petitioners' contention here that the exercise of a federal reserved water right must be limited so as "equitably" to accommodate the demands of competing junior water users is indistinguishable in principle from the equitable balancing argument that this Court rejected in *Cappaert.*[19]

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[18] This Court further stated (426 U.S. at 139 n.4):

> Nevada is asking, in effect, that the Court overrule *Arizona* v. *California,* 373 U.S. 546 (1963), and *United States* v. *District Court for Eagle County,* 401 U.S. 520 (1971), to the extent that they hold that the implied-reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." * * * However, since balancing the equities is not the test, those cases need not be disturbed.

[19] Moreover, the Wyoming Supreme Court demonstrated a "sensitivity" (88-553 Cross-Pet. 13) to the interests of other water users, stating (Pet. App. 72a):

> In the case at bar, the purpose of the reservation for which water is reserved is narrow—agricultural only. The right was

In sum, petitioner and the non-Indian cross-petitioners have shown no adequate reason for now reconsidering the PIA standard.[20] As this Court observed in *Arizona I,* the PIA standard is particularly well suited to quantification of the reserved water rights for the agricultural purposes of Indian reservations. It offers a comparatively objective means of quantifying such rights, whereas any standard based upon "foreseeable needs" would necessarily involve a high measure of subjective judgment. Here, as in *Arizona II,* reconsideration of the PIA standard would open a "Pandora's Box" (460 U.S. at 625) and inject grave uncertainty into Indian water rights litigation.[21]

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quantified based on PIA—the master and the [district] court rejecting some 50,000 acres originally claimed by the United States and the Tribes. The Indians' claim was further reduced by requiring an efficiency increase in historic lands. All of this evidences a sufficient sensitivity to the water needs of other water users.

[20] Petitioner maintains (Pet. 23-26) that the Wyoming Supreme Court's use of the PIA standard conflicts with the decisions in *United States* v. *Walker River Irr. Dist.,* 104 F.2d 334, 339-340 (9th Cir. 1939), in which the court applied a "needs" standard, and *United States* v. *Ahtanum Irrigation District,* 236 F.2d 321, 337 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), in which the court found an implied reservation of such waters as were "required to provide for the reasonable needs of the Indians * * *." Both of those Ninth Circuit decisions, however, preceded this Court's decision in *Arizona I.* Thus, to the extent that they deviate from the PIA standard, they have no continuing precedential value, and in fact the Ninth Circuit has applied the PIA standard since *Arizona I* was decided. See, *e.g., United States* v. *Adair,* 723 F.2d 1394, 1415-1416 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

[21] Petitioner's contention (Pet. 23-26) that the application of the PIA standard in this case resulted in a grossly excessive award is meritless. The Tribes relinquished their claims to vast aboriginal lands in exchange for the Wind River Reservation. The 1868 Treaty that effected this exchange recognized that the Tribes faced substantial cultural obstacles in developing an agricultural economy and that the

4. The non-Indian cross-petitioners contend (88-553 Cross-Pet. 19-22) that the Wyoming courts were obligated to use the discount rate established by the Water Resources Council (WRC) pursuant to Section 80(a) of the Water Resources Development Act of 1974 (WRDA), 42 U.S.C. 1962d-17(a), in considering whether lands on the Reservation can be feasibly irrigated in the future.

The choice of an appropriate discount rate is one step in determining whether acreage is "susceptible to sustained irrigation at reasonable costs" (Pet. App. 47a). The Wyoming Supreme Court correctly held that the special master's choice of a 4% discount was consistent with the expert testimony on the subject (Pet. App. 53a-54a). It is clear from the WRDA's plain terms that the Wyoming courts were not required as a matter of law to disregard their own assessment of the evidence and instead to employ the WRC discount-rate formula in quantifying Indian water rights. Section 80(a) states that the interest-rate formula established pursuant to that provision is to be

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Tribes' conversion from a nomadic to an agrarian existence would take time. Petitioner's contention that the Tribes should now be restricted to their "historic" water usage—and prevented from realizing further development of their practicably irrigable lands—is neither consistent with the Treaty nor fair. Indeed, given the special master's finding that "[t]he history of the Reservation consistently shows a level of unemployment far in excess of the rest of Wyoming" (Pet. App. 569a), it would appear that the Tribes have a compelling need to develop the agricultural potential of the Reservation. Thus, even if petitioner were correct that a court should attempt to calculate a reserved water right on the basis of its assessment of the Indians' "needs"—unanchored in any determination of the amount of irrigable land that Congress set aside for their benefit—there is no reason to believe that the quantification of the reserved water right in this case would be different. This case accordingly would not present a suitable occasion to revisit the PIA issue even if the Court were otherwise disposed to do so.

used "in plan formulation for discounting future benefits and computing costs by Federal officers, employees, departments, agencies, and instrumentalities in the preparation of comprehensive regional or river basin plans and the formulation and evaluation of Federal water and related land resources projects" (42 U.S.C. 1962d-17(a)). The WRDA requires federal agencies to use the WRC discount rate when making their feasibility studies concerning federal water-related projects. Such federal feasibility studies are specialized undertakings that often include a wide variety of public costs and benefits, such as flood control, effects on navigation, fish and wildlife, indirect economic benefits, and the like. They therefore may differ widely from other types of feasibility determinations, such as the one conducted here concerning the Tribes' future lands. The WRC interest rate was adopted for federal water project cost-benefit analysis only and is not necessarily appropriate for other purposes.[22]

5. Petitioner and the non-Indian cross-petitioners also object (Pet. 28-29; 88-553 Cross-Pet. 22-24) to the Wyoming Supreme Court's resolution of issues concerning the recognition of water rights when Indian lands pass into non-Indian ownership, as well as the recognition of water rights for such lands when they are reacquired by the Tribes. The Wyoming Supreme Court discussed these issues in a relatively brief portion (Pet. App. 72a-75a) of

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[22] The non-Indian cross-petitioners are mistaken in urging (88-553 Cross-Pet. 22 n.27) that the Wyoming Supreme Court's decision conflicts with the Tenth Circuit's decision in *Johnston* v. *Davis*, 698 F.2d 1088 (1983). *Johnston* holds only that a federal agency may use the WRC discount rate when preparing an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* It yields no suggestion that a state court must use the WRC discount rate when quantifying an Indian tribe's reserved water rights.

its lengthy opinion, and, contrary to the contention of petitioner and the non-Indian cross-petitioners, it did not articulate any principles of law that conflict with those expressed by the Ninth Circuit in *Colville Confederated Tribes* v. *Walton,* 647 F.2d 42, cert. denied, 454 U.S. 1092 (1981), and *United States* v. *Anderson,* 736 F.2d 1358 (1984). These issues therefore do not warrant review.

In *Walton,* the Ninth Circuit held that the non-Indian successor to an allottee takes title to the allottee's proportionate share of the reserved right, provided that the allottee had put the water to use or that the non-Indian purchaser does so within a reasonable time (647 F.2d at 51). Any such water right, moreover, must be maintained by continued use and not lost by non-use (*ibid.*). The Wyoming Supreme Court discussed *Walton,* with approval, in that portion of its opinion dealing with the water rights of the individual non-Indian appellants who are successors to Indian allottees (Pet. App. 72a-75a), stating that "[o]n remand, appellants [non-Indian successors] must be awarded a reserved water right with an 1868 priority date for the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter" (Pet. App. 75a). The court, however, did not expressly state, as did the Ninth Circuit in *Walton,* that any such rights must be continually maintained in order to protect them from loss through non-use. Unlike the non-Indian cross-petitioners (88-553 Cross-Pet. 24), however, we do not read the Wyoming Supreme Court's failure expressly to spell out the consequences of non-use as creating a conflict with *Walton.* The Wyoming Supreme Court did not state that *Walton* rights held by non-Indians cannot be lost through non-use. Rather, the court simply failed to address that subject one way or the other, perhaps because further proceedings are contemplated on

the rights of non-Indians who claim *Walton* rights (Pet. App. 75a). Hence, the opinion of the Wyoming Supreme Court cannot reasonably be read as adopting the principle that *Walton* rights, once established, may not be lost through non-use.

In *Anderson,* the Ninth Circuit further held that if a tribe reacquires formerly allotted lands, the "*Winters* rights appurtenant to allotted lands conveyed to a non-Indian purchaser will pass with title upon reacquisition by the Tribe and will retain their original priority date" (736 F.2d at 1362). The Wyoming Supreme Court's opinion in this case contains nothing indicating that it disagreed with the Ninth Circuit's discussion in *Anderson* of the appropriate principles to be applied when an Indian tribe reacquires allotted lands. The Wyoming Supreme Court simply stated, after discussing the rights of the *non*-Indian purchasers of allotted lands (Pet. App. 72a-75a), that when such lands are reacquired by the Tribe, there "is no reason then to deny the same priority to an Indian or tribal purchaser" (Pet. App. 75a). Petitioner objects (Pet. 29) that the court did not expressly state that there must be a showing that the reserved right was not lost through non-use by the intervening non-Indian owner. However, the court made clear that the tribal purchaser succeeds to the "same priority" as a non-Indian purchaser, and it therefore presumably would agree with the position of *Anderson*—and of petitioner herein—that the Tribe does not obtain a reserved right to reacquired lands if the reserved right has already been lost by the intervening non-Indian owner. The court's failure to address this issue explicitly may be due to petitioner's failure to make a showing of such a loss by non-use with respect to particular parcels of reacquired allotted lands.

Finally, the Ninth Circuit held in *Anderson* that, as to former Indian lands that were disposed of to non-Indians under a surplus lands act (rather than by Indian allottees)

and were later reacquired on behalf of the Indians, the tribe obtains a water right with a priority date as of the time the non-Indian obtained a water right, if any (736 F.2d at 1363). If no such state-law water right existed upon the date of reacquisition, then the tribe obtains a reserved water right with a priority date as of the date of reacquisition (*ibid.*). In this case, the Wyoming Supreme Court did not separately address the existence of water rights for those reacquired lands that originally were disposed of to non-Indians under the 1905 Act, rather than by individual allottees. The court's silence may be attributable to the fact that petitioner itself failed to urge that those lands should be treated differently and to lay a proper foundation for such an argument in the course of this litigation. Indeed, although the United States brought this aspect of *Anderson* to the attention of the Wyoming Supreme Court, petitioner urged that Court to disregard *Anderson* and to deny a reserved water right to *all* reacquired lands, whether they were originally alienated by individual allottees or pursuant to the 1905 Act. See generally Brief of Appellee State of Wyoming in Response to the Appellant's Brief of the United States and Tribes (Type 1 Claims), at 151-185. Against this background, the Wyoming Supreme Court's failure to address the 1905-Act lands separately is understandable.[23] In any event, the Wyoming Supreme Court's *silence* with respect to lands disposed of under a surplus lands act does not create a conflict with the Ninth Circuit's discussion of that subject in *Anderson*.[24]

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[23] Petitioner did rely on this distinction in its brief in support of its petition for rehearing (at 46-50) in the Wyoming Supreme Court, but the court denied that petition without comment (Pet. App. 122a). The state court's failure to address that issue at petitioner's behest for the first time on rehearing does not raise an issue for this Court's consideration.

[24] The district court, which—contrary to the Ninth Circuit's holdings in *Walton* and *Anderson*—ruled (Pet. App. 224a-225a) that

6. The non-Indian cross-petitioners also assert (88-553 Cross-Pet. 24-30) that the United States should be equitably estopped from asserting reserved water rights on behalf of the Tribes because the United States induced non-Indians to settle in the area knowing that the land could be profitably farmed only by irrigation, which, in turn, necessitated secure water supplies. The Wyoming Supreme Court correctly rejected that argument (Pet. App. 22a-23a).

The United States would not be estopped here even under the rules generally applicable in cases involving wholly private parties. Equitable estoppel requires, as an indispensable element, a misrepresentation by the party against whom the estoppel is invoked. See *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). There is no showing here that the United States ever represented that there would be sufficient water to irrigate lands patented to non-Indian settlers under the general public land laws. It is well established that a federal patent does not carry with it any right to the use of water; rather, an entryman must look elsewhere to perfect a water right. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158-164

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an Indian allottee's non-Indian successor could not acquire a share of the reserved water right, did identify parcels that had passed into non-Indian ownership and that were subsequently reacquired on behalf of the Tribes (Pet. App. 173a-182a). The district court, however, did not differentiate between former allotted lands and former surplus-land-act lands. Notably, however, even under the district court's holding, the great majority of the water rights associated with the reacquired lands would be awarded early priority dates, typically before 1920. Petitioner has not asserted that the difference between such priority dates, as awarded by the district court, and the 1868 priority date awarded by the Wyoming Supreme Court, will, as a practical matter, have significant adverse effects upon water rights claimed by other parties.

(1935). Hence, the United States does not, by making lands available under the public land laws, represent that sufficient water will be available to make the lands productive. Nor is there any showing here that the United States ever represented that it would not claim reserved water rights on behalf of the Tribes. In fact, the district court specifically held that there is "no evidence in the record to support a finding of affirmative misconduct by the Federal Government" (June 8, 1984, Order at 13). The lack of any misrepresentation concerning water rights is, alone, fatal to any equitable estoppel argument.

7. The Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Indian Reservation have filed a conditional cross-petition requesting that, if the Court grants Wyoming's petition for a writ of certiorari, the Court also address six additional issues that the Wyoming Supreme Court decided against the Tribes. See 88-492 Cross-Pet. i-ii. In our view, this Court should not undertake review of Wyoming's claims of error in this complex water rights dispute without also considering those issues raised by the Tribes that are closely related. We therefore submit that if the Court grants Wyoming's petition, the Court should have before it the Tribes' issues as well. Cf. *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

CONCLUSION

The petition and cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 241-699/60782